

# Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders

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## INTRODUCTION

Approximately two-thirds of sexual assaults investigated by law enforcement agencies in the United States involve a victim under the age of eighteen.<sup>1</sup> In the majority of cases, the perpetrator is a relative or acquaintance of the victim.<sup>2</sup> Abuse by strangers is far less common, representing approximately fourteen percent of sexual abuse against children.<sup>3</sup> While most victims of sexual abuse survive the experience, they may suffer long-term physical and emotional injuries, including an increased risk of depression, post-traumatic stress disorder (PTSD), poor self-esteem, personality disorders, and substance abuse.<sup>4</sup> In a small number of horrific cases, the victims are brutally attacked or murdered. These cases

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<sup>1</sup> HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf.saycrle.pdf> (last visited July 3, 2011).

<sup>2</sup> *Id.* at 10; *see also* Jill S. Levenson et al., *Public Perceptions about Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137, 143 (2007) (summarizing studies showing that children are far more likely to be sexually abused by a relative or friend than by a stranger); U.S. DEP'T OF JUSTICE, OFF. OF JUSTICE PROGRAMS, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), *available at* <http://www.csom.org/pubs/mythsfacts.html>.

<sup>3</sup> SNYDER, *supra* note 1, at 10.

<sup>4</sup> *See, e.g.,* Candice Feiring et al., *Age and Gender Differences in Children's and Adolescents' Adaptation to Sexual Abuse*, 23 CHILD ABUSE & NEGLECT 115 (1999); Saul Rosenthal et al., *Emotional Support and Adjustment over a Year's Time Following Sexual Abuse Discovery*, 27 CHILD ABUSE & NEGLECT 641, 642 (2003) (citing numerous studies on the effects of sexual abuse on children and adolescents).

have inspired state and federal legislators to enact laws mandating sex offender registration and community notification. Despite the questionable efficacy of sex offender registration as a crime prevention measure, there is a clear legislative trend toward registering broader categories of offenders, including many nonviolent offenders.<sup>5</sup> Some states have also adopted laws restricting sex offenders from living or working near schools, playgrounds, and other locations where children congregate.

The underlying theory of sex offender registration is that it assists parents, neighbors and local authorities to identify potential predators and to protect children from coming into contact with them. Proponents of registration also regularly use the discourse of rights. In particular, they argue that registration and community notification are necessary to protect the right of children to be free from sexual abuse, a right that easily trumps the rights of sex offenders in any legislative debate.<sup>6</sup>

Yet the actual consequences of these laws for children are complex and demand careful analysis, particularly in the context of sexual offenders who are also children. Until recently, the treatment of juvenile sex offenders was governed by state law and a significant number of states either declined to place juveniles on sex offender registries or did so only when the juvenile posed a demonstrable risk to the community. This legal framework has, however, been challenged by the enactment of the Adam Walsh Child Protection and Safety Act of 2006 (hereinafter the Adam Walsh Act).<sup>7</sup> Title 1, the Sex Offender Registration and Notification Act (SORNA),<sup>8</sup> requires states to participate in a national sex offender registry and comply with detailed minimum standards or risk a reduction in federal funding.<sup>9</sup> Under SORNA, juveniles who have attained the age of fourteen and committed certain sexual offenses shall be required to register, without regard to their

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<sup>5</sup> J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161–206 (2011). While Prescott and Rockoff use the term “nonviolent” to include statutory rape and incest where no weapon or physical force was used, it can be argued that the term “nonviolent” should never be used to describe offenses that involve sexual violation of a child.

<sup>6</sup> For examples of instances in which the rhetoric of children’s rights has been used in legislative and other debates on sex offender registration, see Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L. J. 315, 342, 356 (2007); *Sex-Offender Registration Laws Pit Victims’ Rights against Civil Rights*, N.Y. TIMES, Feb. 20, 1993, available at <http://www.nytimes.com/1993/02/20/us/sex-offender-registration-laws-pit-victims-rights-against-civil-rights.html?pagewanted=all&src=pm>. As discussed later in this article, the United States has also cited sex offender registration in reports to the United Nations Committee on the Rights of the Child.

<sup>7</sup> Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. 109-248, 120 Stat. 587 (codified as amended in various sections of 18 U.S.C. and 42 U.S.C.).

<sup>8</sup> Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590 (codified as amended in scattered sections of 18 and 42 U.S.C.).

<sup>9</sup> 42 U.S.C.A. § 16925 (2011).

individual circumstances or assessment of risk.<sup>10</sup> The obligation to register juvenile offenders is one of the chief barriers to compliance with SORNA.<sup>11</sup> Although the final deadline for implementing SORNA was July 27, 2011, thus far only fifteen states have been deemed compliant.<sup>12</sup> States that have traditionally taken a more protective or individualized approach to juvenile offenders may decide to forgo federal funding rather than include minors in sex offender registries.<sup>13</sup>

Previous critiques of the juvenile offender provisions of SORNA have not tested the legislation against the standards set forth in the United Nations Convention on the Rights of the Child (CRC).<sup>14</sup> The CRC is widely recognized as the most comprehensive and authoritative international treaty on the rights of children. Historically, children did not enjoy legal rights, as they were considered the property of their parents until they reached adulthood. In the period between the two world wars, the international community began to adopt instruments to protect children from abuse.<sup>15</sup> While these early documents conceived of children's rights primarily as rights to protection and social welfare, the CRC goes further and endows children with civil and participatory rights.<sup>16</sup> Yet it also recognizes the limited capacity of children and the rights of parents to

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<sup>10</sup> 42 U.S.C.A. §§ 16911(8), 16913.

<sup>11</sup> See COUNCIL OF STATE GOV'TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES: SORNA AND SEX OFFENDER POLICY IN THE STATES, PUBLIC SAFETY BRIEF 5 (2010), available at <http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf>.

<sup>12</sup> See U.S. Dep't. of Justice, *Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, Jurisdictions That Have Substantially Implemented SORNA*, [http://www.ojp.gov/newsroom/pressreleases/2011/SMART\\_PR-072811.htm](http://www.ojp.gov/newsroom/pressreleases/2011/SMART_PR-072811.htm) (last visited Dec. 21, 2011). The National Conference of State Legislatures publishes a database of state legislation enacted to comply with SORNA. See Nat'l Conf. of State Legislatures, *Sex Offender Enactments Database*, <http://www.ncsl.org/?TabId=19158> (last visited July 19, 2011).

<sup>13</sup> For coverage of the debate on whether to comply with SORNA, see Emanuella Grinber, *Five Years Later, States Struggle to comply with Federal Sex Offender Law*, CNN.COM, July 28, 2011, available at [www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html?hpt=hp\\_c2](http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html?hpt=hp_c2).

<sup>14</sup> Convention on the Rights of the Child [hereinafter CRC], G.A. Res. 44/25, art. 3, U.N. Doc. A/44/49 (Nov. 20, 1989) (especially arts. 6, 19 and 34–36), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>. Adopted and opened for signature in Nov. 1989 and entered into force on Sept. 2, 1990.

<sup>15</sup> For examples of early protective treaties, see ILO Convention Concerning the Night Work of Young Persons Employed in Industry, Nov. 28, 1919 and ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919 (both available at <http://www.ilo.org/ilolex/english/convdisp1.htm>); see also the Geneva Declaration of the Rights of the Child, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>16</sup> See, e.g. CRC, *supra* note 14, art. 12 (right to be heard in judicial and administrative proceedings), art. 13 (freedom of expression), art. 14 (freedom of thought, conscience, and religion), art. 15 (freedom of assembly), and art. 16 (right to privacy).

provide direction “in a manner consistent with the evolving capacities” of the child.<sup>17</sup>

The CRC now has 193 state parties, more than any other core United Nations human rights treaty. Although the United States has not yet ratified the CRC, it has been a signatory since 1995<sup>18</sup> and is therefore obligated to “refrain from acts that would defeat the object and purpose” of the treaty.<sup>19</sup> This is a principle of customary international law, codified in the Vienna Convention on the Law of Treaties.<sup>20</sup> The State Department recently confirmed that the Obama administration supports the CRC and is working towards ratification.<sup>21</sup> It is thus appropriate to assess whether the Adam Walsh Act is consistent with the CRC.

The United States has already ratified the two Optional Protocols to the CRC, including the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>22</sup> As a state party, the United States reports periodically to the United Nations Committee on the Rights of the Child, which is also the treaty-monitoring body for the CRC. In its 2010 report, the United States cited the Adam Walsh Act as an example of federal legislation that helps to protect children from sexual abuse and thus promote the rights of children.<sup>23</sup> However, the U.S. report to the Committee

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<sup>17</sup> See, e.g. CRC, *supra* note 14, art. 14(2).

<sup>18</sup> Madeline Albright, acting as the United States delegate to the United Nations, signed the treaty on February 16, 1995. For discussion of the arguments that were made for and against signing, see Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 162, 170–71 (2006).

<sup>19</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (1987).

<sup>20</sup> Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331. Adopted and opened for signature in 1969 and entered into force Jan. 27, 1980. Although the United States has not ratified the Vienna Convention, it does not dispute that Article 18 reflects a principal of customary international law that binds all nations.

<sup>21</sup> U.S. DEP’T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW: RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT PARA. 28, Mar. 10, 2011, *available at* <http://www.state.gov/g/drl/upr/157986.htm>. For updates on the campaign for ratification, see The Campaign for U.S. Ratification of the Convention on the Rights of the Child, *available at* <http://childrights.campaign.org/what-is-the-crc/the-status-of-the-crc> (last visited June 29, 2011).

<sup>22</sup> The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), *available at* <http://www2.ohchr.org/english/law/crc-sale.htm>, was ratified by the United States on December 23, 2002. The United States has also ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263, 2173 U.N.T.S. 222 (May 25, 2000), which is not discussed in this article.

<sup>23</sup> See PERIODIC REPORT OF THE UNITED STATES OF AMERICA AND U.S. RESPONSE TO RECOMMENDATIONS IN COMMITTEE CONCLUDING OBSERVATIONS OF JUNE 25, 2008 (PERIODIC REPORT OF THE U.S.) para. 40, CRC/C/OPSC/USA/2 (Jan. 22, 2010), submitted to the Committee on the Rights of the Child regarding the Optional Protocol to the

did not disclose the extent to which certain states have resisted complying with the Adam Walsh Act, particularly with the requirement to register certain children as sex offenders. Nor does the report fully analyze the impact of this legislation on children and its potential conflicts with the CRC, the parent treaty to the Optional Protocol. This article provides that analysis and argues that no child should be required to register as a sex offender unless an individualized assessment determines that the juvenile poses a significant risk to the community.

Part II of the article reviews the history of sex offender registration laws, the extent to which states have required juvenile offenders to register, and the potential impact of SORNA on state law. Part III analyzes the conflicts between these laws and the rights of children, applying the framework of the CRC. Part IV discusses the conflicts between SORNA and the policy goals of the American juvenile justice system: rehabilitation, reintegration, and maintaining the confidentiality of juvenile delinquency adjudications. This section of the article will draw in part upon experience from Hawaii, one of the states that has a strong commitment to rehabilitating juvenile offenders and thus has been reluctant to comply with the juvenile registration provisions of the Adam Walsh Act.

## II. THE EVOLUTION OF SEX OFFENDER REGISTRATION LAWS AND THE TREATMENT OF JUVENILES

This part reviews: (A) the development of state and federal laws requiring sex offender registration and community notification; (B) the extent to which these laws have been applied to juvenile offenders, which varies considerably from state to state; and (C) the potential impact of SORNA on states' treatment of juvenile offenders.

### A. THE DEVELOPMENT OF SEX OFFENDER REGISTRATION LAWS

The movement to enact state laws requiring sex offender registration began in the late 1980s. All fifty states now have laws requiring sex offenders to register, often for the remainder of their lives. Ideally, these laws should have been based on solid data and policy analysis, including a careful examination of societal costs and benefits. This has not been the case. The legislation has been inspired by a small number of famous and horrific crimes, which is why the laws are frequently named after the child victim. When legislators hear the detailed story of the rape, mutilation, and murder of a child, they understandably want to take action. Individuals who committed sexual offenses in the past present easy targets for public outcry. Proponents of sex offender registration laws tend to characterize all sexual offenders in dehumanizing terms, comparing them to animals and

portraying them as violent predators who cannot control their urge to abuse children.<sup>24</sup> As a result, states have enacted increasingly broad sex offender legislation that is not necessarily limited to individuals who pose a threat to children.<sup>25</sup> Rather, the laws have been drafted to cover many nonviolent offenders and offenses that are not characterized by high recidivism rates. Indeed, some sex offender laws contain such broad definitions that individuals who did not even commit a sexual offense have been compelled to register.<sup>26</sup>

Initially, most states limited the release of registration information to law enforcement agencies. The legislative goals were to help authorities monitor offenders and to locate potential suspects if a child went missing. However, after several high-profile abduction cases, states began to add community notification as an additional enforcement tool. Proponents of community notification argued that parents and other caregivers needed the identities and addresses of all convicted sex offenders living in the community in order to protect children from abduction. These groups tend to exaggerate the risk of children being abducted and abused by strangers and underestimate the amount of sexual abuse committed by friends and family.<sup>27</sup>

Although criminal law is primarily governed by state law, the United States Congress has used the “power of the purse” to encourage standardization of state approaches to sex offender registration.<sup>28</sup> The first

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<sup>24</sup> For examples of rhetoric used by proponents of sex offender registration laws, see generally Filler, *supra* note 6, at 338–40; Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 165, 170, 176 (2003).

<sup>25</sup> Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUST. POL’Y REV. 31, 44–45 (2010). While it is not possible to predict with certainty whether a particular offender poses a danger, risk assessment processes have been developed and applied to juvenile sex offenders. It should also be noted that juvenile sex offenders have lower recidivism rates than adults and respond well to multisystemic treatment programs that focus on reintegration, reducing any danger that they pose to the community. See Charles M. Borduin et al., *A Randomized Clinical Trial of Multisystemic Therapy with Juvenile Sexual Offenders: Effects on Youth Social Ecology and Criminal Activity*, 77 J. OF CONSULTING AND CLIN. PSYCH. 26–37 (2009); Charles M. Borduin & Cindy M. Schaeffer, *Multisystemic Treatment of Juvenile Sexual Offenders: A Progress Report*, in SEX OFFENDER TREATMENT: ACCOMPLISHMENTS, CHALLENGES AND FUTURE DIRECTIONS 25–42 (Michael H. Miner & Eli Coleman eds., 2001). Ironically, as discussed in Parts III and IV of this article, requiring juveniles to register as sex offenders may impede these treatment programs.

<sup>26</sup> Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders*, 16 WM. & MARY BILL RTS. J. 497, 519–24 (2007).

<sup>27</sup> See *id.* for examples of how proponents have misused statistics and crime reports to exaggerate the number of abductions.

<sup>28</sup> Congress frequently conditions receipt of federal funds upon compliance by the recipient with federal statutory and administrative directives. Thus, objectives that are not within Congress’ enumerated legislative fields may nevertheless be attained through the

major piece of federal legislation was inspired by the abduction of eleven-year-old Jacob Wetterling.<sup>29</sup> Congress enacted the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act of 1994<sup>30</sup> as part of the Violent Crime Control and Law Enforcement Act of 1994. The Wetterling Act required every state to establish a sex offender registry or face a ten-percent reduction in federal funding for law enforcement. While it did not *require* states to disclose sex offenders' personal information to the public, it authorized community notification if local law enforcement determined that this measure was necessary to protect the public.

The next important piece of federal legislation was Megan's Law, named after Megan Kanka, who was abducted and murdered by a convicted sex offender who lived on her street.<sup>31</sup> Enacted in 1996, Megan's Law amended the Wetterling Act by changing "may release" personal information to "shall release" personal information, such as an offender's residence, thus effectively mandating community notification. Every state now has a sex offender registration law with a community notification component. However, Megan's Law left the states with significant discretion regarding the types of offenses that should be covered and the method of community notification.

States can expand upon the federal standards and many have done so. For example, some states and municipalities have adopted legislation that prohibits convicted sex offenders from living near places where children gather (e.g. schools and playgrounds) or requiring that they stay a certain distance away from such locations. According to a survey by the Council of State Governments, by 2008 "29 states had adopted some form of residency" restrictions on sex offenders.<sup>32</sup> Although there has been a strong civil liberties critique of these laws, it has largely failed to stem the tide towards harsher laws. This trend is not surprising because legislators often

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spending power. This is not considered to be an unconstitutional intrusion into state lawmaking powers because the state can choose to decline the federal funding. *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>29</sup> See Jacob Wetterling Resource Center, *How We Began and the Need for Transition*, <http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx> (last visited Jan. 8, 2011) (discussing the abduction and how it inspired the creation of the Jacob Wetterling Resource Center which merged, in 2010, with the National Child Protection Training Center).

<sup>30</sup> Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Program, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

<sup>31</sup> Megan's Law of 1996, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified at 42 U.S.C. § 14071(e)(2) (2000)).

<sup>32</sup> THE COUNCIL OF STATE GOV'TS, PUBLIC SAFETY BRIEF, SEX OFFENDER MANAGEMENT PROJECT, ZONED OUT: STATES CONSIDER RESIDENCY RESTRICTIONS FOR SEX OFFENDERS 1 (Fall 2008), available at [http://www.csg.org/knowledgecenter/docs/pub\\_safety/ZonedOut.pdf](http://www.csg.org/knowledgecenter/docs/pub_safety/ZonedOut.pdf) (last visited Jan. 8, 2011).

respond to concerned constituents and the public generally supports registration and community notification, as well as residency restrictions.<sup>33</sup> Ironically, empirical studies indicate that registration and community notification have done little (if anything) to increase public safety.<sup>34</sup> Yet the public continues to support these laws, largely due to misconceptions about the nature of sex offenders, their recidivism rates, and the ability of sex offender registration to prevent crime.<sup>35</sup>

#### B. THE APPLICATION OF STATE SEX OFFENDER REGISTRATION LAWS TO JUVENILES

Juvenile offenders were not considered a priority in the movement for federal sex offender registration laws. Thus, it was initially left to state legislatures to determine whether children who committed sex offenses should be included in state registries. In 1998, only seventeen states expressly required registration of juveniles who had been adjudicated delinquent for sexual offenses.<sup>36</sup> The majority of state registration statutes were silent or ambiguous on the application to juveniles. Some states required juvenile sex offenders to register only if they had been subjected to “judicial waiver” or otherwise transferred out of the juvenile justice system and tried as adults.<sup>37</sup> Other states gave judges the discretion to order registration after a risk assessment had been completed or in the presence of aggravating circumstances.<sup>38</sup>

In recent years, there has been a general legislative trend toward expanding the scope of sex offender registration laws, often to include juvenile offenders. A 2003 study reported that 28 states provided for the registration of juveniles who had been “adjudicated delinquent for certain” sexual offenses but noted significant variation with respect to the crimes

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<sup>33</sup> See generally Debra Lee Cochrane & M. Alexis Kennedy, *Attitudes towards Megan's Laws and Juvenile Sex Offenders*, 7 JUST. POL'Y J. 1 (2010) (summarizing research on public attitudes and misconceptions concerning sex offender registration laws).

<sup>34</sup> Freeman & Sandler, *supra* note 25, at 32 (reviewing four empirical studies conducted from 2005 to 2008).

<sup>35</sup> See generally, Jill S. Levenson et al., *Public Perceptions about Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL'Y 1 (2007); CTR. FOR SEX OFFENDER MGMT., A PROJECT OF THE U.S. DEP'T. OF JUSTICE, OFF. OF JUSTICE PROGRAMS, EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL (2010), *available at* <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf>.

<sup>36</sup> Stacey Hiller, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 278 (1998).

<sup>37</sup> Judicial waiver laws are not the only method of transferring a juvenile to adult court. See Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 497–98 (2009) (describing the three main methods: judicial waiver, concurrent jurisdiction, and statutory exclusion laws).

<sup>38</sup> Linda Szymanski, *Megan's Law: Registration Applicable to Juveniles by Statute*, 4 NCJJ SNAPSHOT (Nat'l Center for Juvenile Justice) (1999) (reporting on survey of states conducted by National Center for Juvenile Justice at end of 1998).



that triggered the registration requirement and the extent of community notification.<sup>39</sup> In 2005, the National Center for Juvenile Justice (NCJJ) reported that 32 states were applying sex offender registration laws to juveniles;<sup>40</sup> this number increased to 36 in 2006.<sup>41</sup> However, the NCJJ surveys count all states that permit or require juveniles to be registered as sex offenders, and about half of these states gave the judiciary substantial discretion in determining whether a juvenile must register as a sex offender.<sup>42</sup> This process would normally entail an individualized assessment of whether the child poses a significant risk to the community. Some states have also permitted juveniles who demonstrate successful rehabilitation to be removed from registries, which is consistent with the traditional philosophy of the juvenile justice system.<sup>43</sup>

We conducted our own review of state legislation and classified states among three categories based upon the level of protection that the state appeared to provide to juvenile sex offenders in the pre-SORNA legal regime. (We conducted our review after the Adam Walsh Act had been enacted but before any states had been certified as compliant with the new federal standards.<sup>44</sup>) After analyzing the statutory language and other information on the implementation of the laws, we classified the fifty states into the following categories:

(1) The “non-protective” category consisted of states that specifically required registration and community notification for juveniles adjudicated delinquent for certain crimes. This category also included states that did not appear to differentiate between adult and juvenile offenders when applying their sex offender registration laws. We placed thirteen states in this category: Florida, Indiana, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Jersey, Ohio, South Carolina, South Dakota, Utah, and Virginia. However, it should be noted that there was variation within this category, as some of these states only applied the registration requirement to juveniles fourteen and older, while others applied it to younger offenders. We also noted some

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<sup>39</sup> Garfinkle, *supra* note 24, at 177–78.

<sup>40</sup> Linda Szymanski, *Megan’s Law: Judicial Discretion over Requiring Juveniles to Register as Sex Offenders*, 10 NCJJ SNAPSHOT (2005).

<sup>41</sup> Linda Szymanski, *Megan’s Law: Juvenile Sex Offender Registration (2006 Update)*, 11 NCJJ SNAPSHOT (2006).

<sup>42</sup> Szymanski, *supra* note 40.

<sup>43</sup> AMANDA PETTERUTI & NASTASSIA WALSH, JUST. POL’Y INSTIT., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH COMMUNITIES 3 (2008), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh\\_act.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf). See also Linda A. Szymanski, *Megan’s Law—Termination of Registration Requirement (2009 Update)*, 14 NCJJ SNAPSHOT (2009).

<sup>44</sup> States were initially expected to comply by July 2009. However, as discussed below, the U.S. Attorney General exercised his authority to extend the deadline for all states to July 2010 and subsequently granted all states that needed more time a further extension to July 27, 2011.

variation in the length of time a juvenile sex offender would be required to register.

(2) The “protective” category consisted of states that did not include juveniles in the registration statute or registered a juvenile offender *only* when s/he was tried as an adult. In this category we placed twelve states: Alaska, Georgia, Hawaii, Kentucky, Maine, Nebraska, New Mexico, Pennsylvania, Tennessee, New York, West Virginia, Wyoming.

(3) By far, the largest number of states (twenty-five) fell within the “mid-range” category, which permitted registration and/or community notification for juveniles but applied risk assessment and/or granted the judiciary discretion in deciding whether juveniles who were adjudicated delinquent of certain sex crimes must submit to these programs. In this category, we initially placed Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Washington, and Wisconsin. We added the following additional states to this “mid-range” category because they provided for termination of a juvenile sex offender’s registration requirement: Arizona, Idaho, Missouri, New Hampshire, and North Carolina. We also placed Vermont in this category because it added certain juvenile sex offenders to the sex offender registry when they reached their eighteenth birthday.

Our review of state statutes revealed two important findings. First, surveys that categorize states as simply “requiring or permitting” the registration of juveniles are too simplistic, especially if one is trying to ascertain the impact of new federal standards. Depending upon how judicial discretion is exercised, there can be a huge difference between a state that requires registration and a state that only permits it. Indeed, there may also be large differences among the states placed in our “mid-range” category; two states in that category could have similar laws on the books that yield different outcomes for juvenile sex offenders, depending upon how judges and other decision-makers exercise their discretion in individual cases. The second important finding is that a fairly small number of states prefer to register juvenile sex offenders based *solely* upon the type of offense. Most states that included juvenile offenders also designed safeguards to protect them, such as judicial discretion, consideration of individual circumstances, assessment of risk, and/or early termination of juvenile registration. This is interesting because the need to comply with SORNA is pushing states in the opposite direction. As explained in the next section, SORNA seeks to compel states to register certain juvenile sex offenders on the basis of the offense, without regard to individual circumstances or risk assessment.

### C. ASSESSING THE IMPACT OF SORNA ON STATES' APPROACHES TO JUVENILE OFFENDERS

SORNA is part of the Adam Walsh Act and replaces previous federal laws and amendments pertaining to sex offender registration and notification. SORNA seeks to standardize registration and community notification among the fifty states, the District of Columbia, the five principal U.S. territories, and federally recognized tribal governments. Each registry jurisdiction is required to participate in a national sex offender registry and comply with detailed minimum standards for registration and community notification or risk losing ten-percent of their Omnibus Crime federal funding.<sup>45</sup> Under the initial guidelines, compliance with SORNA required states to publish the following information on its sex offender web site for each individual required to be registered: the name of the individual, including all aliases; the address of each residence at which the person resides or will reside; the address of any place where the person is or will be an employee; the address of any place where the individual is a student or will be a student; the license plate number and a description of any vehicle owned or operated by the person; a physical description of the person; the text of the sex offense for which the person is registered and any other sex offense for which the person has been convicted; and a current photograph and date of birth.<sup>46</sup>

The Adam Walsh Act also established, within the U.S. Department of Justice, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART).<sup>47</sup> The SMART office provides technical assistance and training and also determines whether jurisdictions that elect to implement the Act have substantially complied with SORNA. States were initially expected to comply by July 2009, but the U.S. Attorney General exercised his authority to extend the deadline for all states to July 2010. By the end of 2010 only four states (Ohio, Delaware, Florida, South Dakota) and two tribal governments had been deemed compliant with SORNA.<sup>48</sup> The remaining 47 states, the District of Columbia, and all other registration jurisdictions received an additional extension until July 27, 2011.<sup>49</sup> By July 27, 2011, ten additional states had substantially complied with SORNA: Alabama, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, South Carolina, and

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<sup>45</sup> 42 U.S.C.A. §§ 16913, 16921, 16925(a) (2011).

<sup>46</sup> 42 U.S.C. § 16914 (2006).

<sup>47</sup> See Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), <http://www.ojp.usdoj.gov/smart/index.htm> (last visited Jan. 5, 2011).

<sup>48</sup> See U.S. DEP'T. OF JUSTICE, *supra* note 12.

<sup>49</sup> See U.S. DEP'T. OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA EXTENSIONS GRANTED, *available at* [http://www.ojp.usdoj.gov/smart/pdfs/SORNA\\_Extensions\\_Granted.pdf](http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf) (last visited Jan. 15, 2011).

Wyoming.<sup>50</sup> Those states that have not substantially implemented SORNA will suffer a reduction of ten percent of their Byrne/JAG funding in 2012<sup>51</sup> (although they can apply to reacquire the funds if they promise to dedicate the funding solely towards implementation of SORNA<sup>52</sup>).

What accounts for the slow rate of compliance with SORNA? Some states are concerned that SORNA represents another unfunded mandate of the federal government and that compliance will be unduly expensive. Compliance could significantly increase the number of persons required to register and also the frequency of required appearances by sex offenders before law enforcement (because SORNA requires “in person” verification of registration information four times per year).<sup>53</sup> Thus, the increased costs could easily exceed any financial penalty for noncompliance.<sup>54</sup> An official from Texas estimated that the number of appearances at the Austin Police Department would increase from an average of seven per day to an average of 21.4 per day.<sup>55</sup> This three-fold increase would require the department to assign more staff to the process and divert resources from other law enforcement activities. States would also have to purchase new software and technology and incarcerate more individuals, because SORNA provides for mandatory sentencing of those who simply fail to register. The requirements to implement SORNA are very rigid, with little flexibility allowed for states to build these new mandates into their existing systems.

An additional concern is that SORNA imposes a rigid “tiering system” rather than allowing states to conduct their own risk-based assessment.<sup>56</sup> According to the Council of State Governments, at least half of the states

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<sup>50</sup> See U.S. DEP’T. OF JUSTICE, *supra* note 12. The National Conference of State Legislatures also publishes a database of state legislation enacted to comply with SORNA. See Nat’l Conf. of State Legislatures, *supra* note 12.

<sup>51</sup> The Edward Byrne Memorial Justice Assistance Grant Program (commonly known as Byrne/JAG funding), authorized by 42 U.S.C.A. § 3751(a) (2011), provides federal criminal justice funding to state and local jurisdictions and is administered by the U.S. Department of Justice, Office of Justice Programs. See U.S. Dep’t. of Justice, Office of Justice Programs, Bureau of Justice Assistance, *FY 2011: Edward Byrne Memorial Justice Assistance Grant (JAG) Program Frequently Asked Questions* (2011), <http://www.ojp.usdoj.gov/BJA/grant/JAGFAQ.pdf>. Any reductions in funding due to failure to comply with SORNA will be applied in fiscal year 2012. *Id.* at 3.

<sup>52</sup> See U.S. DEP’T. OF JUSTICE, REQUEST FOR REALLOCATION OF BYRNE/JAG GRANT FUNDS, *available at* <http://www.ojp.usdoj.gov/smart/pdfs/reallocationform080211.pdf> (last visited Dec. 1, 2011).

<sup>53</sup> 42 U.S.C.A. § 16916(3) (2011) (requiring Tier III offenders to verify registration information, in person, every three months).

<sup>54</sup> THE COUNCIL OF STATE GOV’TS, *supra* note 11, at 6.

<sup>55</sup> JERRY MADDEN, NAT’L CONF. OF STATE LEGISLATURES, IMPLICATIONS FOR THE STATES OF COMPLIANCE W/ ADAM WALSH ACT 7, *available at* <http://www.ncsl.org/Portals/1/documents/standcomm/sclaw/AWAMadden.pdf> (last visited Aug. 6, 2011).

<sup>56</sup> 42 U.S.C. § 16911 (2006). See, e.g., concerns expressed in 2010 at the National Conference of State Legislatures. National Conference of State Legislatures, *Law and Criminal Justice Community Session Summary*, Aug. 10, 2010, <http://www.ncsl.org/?tabid=21022>.

have been using risk-based assessment tools to categorize sex offenders.<sup>57</sup> When applied correctly, these tools can help to predict the likelihood of reoffending, and thus the need for continued monitoring and treatment. However, under SORNA, states would be required to categorize offenders on the basis of their *offense*, which is considered a poor predictor of risk to the community. One study of sex offenders in New York concluded that the SORNA tier system “is almost completely ineffective at categorizing sex offenders based on risk of sexual recidivism” and that “the use of almost any empirically based risk factor would yield more accurate predictions.”<sup>58</sup>

The inclusion of children on sex offender registries is, however, the most troubling issue for states that are considering whether to comply with SORNA.<sup>59</sup> SORNA is the first piece of federal legislation that requires states to place certain children on sex offender registries. Under SORNA, a juvenile sex offender who is at least fourteen *must* be placed on the registry if prosecuted and convicted as an adult. In order to be deemed compliant with SORNA, states must also register any juvenile who is fourteen or older and adjudicated delinquent for an offense “comparable to or more severe than ‘aggravated sexual abuse’” *or* adjudicated delinquent for a sex act with any victim under the age of thirteen.<sup>60</sup> The legislation established a three-tier system of classifying convicted sex offenders, based on the severity of the offense. Among other acts, sexual assaults are defined as Tier III offenses.<sup>61</sup> Tier III offenders, including juveniles, are required to register for life,<sup>62</sup> and an offender must wait twenty-five years to seek a reduction of the registration requirement.<sup>63</sup> In states that comply with SORNA, judges do not have the discretion to excuse a juvenile offender from registration based upon his risk assessment or other individual circumstances. In addition to the embarrassment of being required to register as a sex offender and difficulties in finding employment or renting an apartment, SORNA requires “in person verification” four times per year.<sup>64</sup> This means that every offender subject to SORNA must periodically appear before officials, pose for a current photograph, and verify the information in the registry.<sup>65</sup> The only exception to registration (which is sometimes referred to as the “Romeo and Juliet” clause) is that states will

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<sup>57</sup> THE COUNCIL OF STATE GOV'TS, *supra* note 11, at 6.

<sup>58</sup> Freeman & Sandler, *supra* note 25, at 45.

<sup>59</sup> See THE COUNCIL OF STATE GOV'TS, *supra* note 11, at 4 (noting that the most commonly cited barrier to compliance was the requirement to register juveniles, listed by 23 states).

<sup>60</sup> 42 U.S.C.A. § 16911(8) (2011).

<sup>61</sup> *Id.* § 16911(4)(A)(i).

<sup>62</sup> *Id.* § 16915(a)(3).

<sup>63</sup> *Id.* § 16915(b)(2)(B) (providing that juvenile offenders may seek reduction of registration requirement after 25 years, if they maintain a clean record).

<sup>64</sup> *Id.* § 16916(3) (requiring Tier III offenders to verify registration information, in person, every three months).

<sup>65</sup> *Id.* § 16916.

not be required to register persons who are convicted of sex offenses involving consensual sexual activity (e.g. statutory rape) where the victim was at least thirteen years old and the offender was no more than four years older than the victim.<sup>66</sup>

In 2009, the Council of State Governments surveyed states on the factors impeding compliance with SORNA. “[T]he most commonly cited barrier to compliance [is] the act’s juvenile registration and reporting requirements,” which twenty-three of the forty-seven states responding to the survey found problematic.<sup>67</sup> This finding is consistent with our own review of state laws and the findings of other recent surveys, which indicate that “states prefer to maintain individual control over their juvenile sex offenders rather than adopt a uniform federal procedure.”<sup>68</sup> The second most frequently cited factor impeding compliance with SORNA is the retroactive application to certain offenders who were convicted or adjudicated delinquent before the law went into force. In contrast, only seven states cited the costs of implementing SORNA, although it appears that these costs could easily exceed the federal funding that is tied to compliance.<sup>69</sup>

In Hawaii, the state legislature appointed a committee, the Adam Walsh Act Compliance Working Group, to study the federal requirements and make recommendations for the state. Hawaii is one of the states we identified as being “protective” of juvenile offenders because juveniles adjudicated in Family Court were not subjected to registration. The Hawaii Working Group studied SORNA and submitted a report recommending *no* changes be made to Hawaii’s present sex offender registration laws.<sup>70</sup> The report acknowledged that a juvenile can, in an appropriate case, be prosecuted in criminal court as an adult and thus become eligible for inclusion on the sex offender registry. However, the Working Group strongly objected to the wider scope of SORNA, which would include juvenile offenders who have attained the age of fourteen solely on the basis of the offense committed, without consideration of mitigating circumstances. A subgroup of individuals with substantial experience in the field examined the question of whether Hawaii should begin to register children who commit sexual offenses.<sup>71</sup> The subgroup reviewed research

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<sup>66</sup> *Id.* § 16911(5)(c).

<sup>67</sup> THE COUNCIL OF STATE GOV’TS, *supra* note 11, at 4.

<sup>68</sup> Szymanski, *supra* note 40.

<sup>69</sup> THE COUNCIL OF STATE GOV’TS, *supra* note 11, at 5.

<sup>70</sup> See STATE OF HAW. DEP’T. OF ATTORNEY GENERAL, REPORT OF THE ADAM WALSH ACT COMPLIANCE WORKING GROUP 8 (2009), *available at* [http://Hawaii.gov/ag/main/publications/reports/legislative\\_reports/2009/awa-report.pdf](http://Hawaii.gov/ag/main/publications/reports/legislative_reports/2009/awa-report.pdf).

<sup>71</sup> The subgroup included: the Executive Director of Hawaii’s Sex Abuse Treatment Center; the Director of Youth Services; a program specialist from Family Court; administrators from Hawaii’s Criminal Justice Data Center and from the Juvenile Justice Information System; a county prosecutor and other lawyers. *Id.* at 3–4.

that demonstrates important differences between juvenile and adult sex offenders. In particular, the subgroup found that “[e]xtensive research into adolescent brain development shows that adolescents and young adults are not fully mature in their judgment, emotional development, and problem-solving and decision-making capabilities.”<sup>72</sup> As a result, juvenile sex offenders may act impulsively and “may not recognize the distress they cause in their victims.”<sup>73</sup> The subgroup further noted that juvenile sexual offending behavior is not fixed behavior, citing the success of juvenile sex offender treatment programs in Hawaii and the low rates of recidivism.<sup>74</sup> The Department of the Attorney General reviewed ten years of Hawaii Family Court data and identified thirty-four juveniles who had been adjudicated for SORNA-eligible offenses; it found that only one of these individuals had recidivated with a new sexual offense.<sup>75</sup> The Working Group thus concluded that Hawaii should not comply with SORNA.<sup>76</sup> The report makes it clear that this recommendation was not based on fiscal considerations, but rather on the Working Group’s disagreement with the broad scope of SORNA, particularly the inclusion of child offenders.<sup>77</sup>

The federal government has attempted to address these concerns by issuing supplemental guidelines that give states the discretion to exempt children who are placed on the registry from public web site disclosure.<sup>78</sup> Under these new federal guidelines, states also have greater discretion regarding the disclosure of juvenile adjudications to schools, public housing, social services, and volunteer agencies. However, the new federal guidelines do not *prohibit* states from publishing this information, and those states that were already non-protective of juvenile offenders (those that we placed in category (1) above) may well include juveniles covered by SORNA in their public registries. The new federal guidelines also do not change SORNA’s basic rules for registration of covered juveniles or the requirement that their personal information be shared with the national database, law enforcement, supervision agencies, and registration authorities in other states.<sup>79</sup> SORNA also makes it very difficult to petition for termination of the registration requirement. This is in opposition to the approach taken to other juvenile offenses, for which the juvenile may petition the Court to have his or her record purged at majority. The next

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<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.* at 4–5.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.* at 5–6. Interestingly, the overall recidivism rate for this group (including nonsexual offenses) was thirteen out of thirty-four; indicating that it may be easier to teach children not to repeat sexual offenses than it is to rehabilitate them generally. Ironically, the juvenile provisions of SORNA seem to assume that the opposite is true.

<sup>76</sup> *Id.* at 4–5.

<sup>77</sup> *Id.* at 4–6.

<sup>78</sup> See Dep’t. of Justice, Office of the Att’y Gen., Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1631 (Jan. 11, 2011).

<sup>79</sup> *Id.* at 1632.

section of the article thus addresses this concern and other conflicts between sex offender registration laws and the rights of children, applying the framework of the CRC.

### III. SEX OFFENDER REGISTRATION AND THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Historically, children were viewed as the property of their parents. While society may have expected parents to generally act in the interests of their children, there was no legal duty to do so. In the early twentieth century, however, the international community began to adopt international instruments that implicitly limited parental rights. For example, in 1919 the International Labour Organisation (ILO) adopted a convention that generally prohibited children younger than fourteen from working in industrial employment.<sup>80</sup> In 1932, the ILO adopted a convention placing limits on the extent to which children could work in nonindustrial employment.<sup>81</sup> The text implicitly provides that children have a right to attend school and obtain meaningful education.<sup>82</sup> These conventions implicitly changed the concept that children were simply the property of their parents, to be exploited as the parents saw fit. In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child.<sup>83</sup> Although brief, the Declaration is noteworthy for its title, which clearly recognizes that children have rights, and also for its strong language regarding society's obligation to assist children when parental protection proves inadequate: "[t]he child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored."<sup>84</sup> After the formation of the United Nations, the General Assembly similarly adopted a Declaration of the Rights of the Child.<sup>85</sup>

In these early instruments, the rights of children were conceived primarily as rights of protection. To some extent, the CRC continues this view in that it contains numerous provisions protecting children's welfare,

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<sup>80</sup> See ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>. The Convention made some exceptions for particular nations and types of employment; it was subsequently revised by ILO Conventions 59 and 138.

<sup>81</sup> See ILO Convention No. 33 Concerning the Age for Admission of Children to Non-Industrial Employment, Apr. 12, 1932, *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>. The Convention made some exceptions for particular nations and types of employment; it was subsequently revised by ILO Conventions 60 and 138.

<sup>82</sup> *Id.* arts. 3, 4.

<sup>83</sup> Geneva Declaration of the Rights of the Child, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>84</sup> *Id.* para. 2.

<sup>85</sup> Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 21, U.N. Doc. A/4354 (1959).



including the right to life, health, and social security.<sup>86</sup> However, the CRC also recognizes that children are distinct rights holders and endowed with certain freedoms and rights of participation.<sup>87</sup> Thus, the CRC protects children's freedom of expression, association, and assembly and states that children's views should be taken into account in matters that affect them, albeit in accordance with their age and maturity.<sup>88</sup> Commentators have rightly pointed out that there is an inherent tension between giving children these participatory rights and the limited legal capacity of children.<sup>89</sup> Governments need to balance children's participatory rights with parental rights and also with the state's obligation to protect children from harm, which is an equally important part of the CRC and the children's rights movement.<sup>90</sup> The CRC emphasizes that the primary consideration shall be the best interests of the child.<sup>91</sup> This does not mean that children must be treated equally to adults but rather that they have an equal right "to have their interests taken into consideration."<sup>92</sup> While best interests of the child is a familiar concept in the United States and frequently applied in child-custody disputes and child abuse cases, courts often assume, without adequate investigation, that parents will act in their children's best interests.<sup>93</sup> Ratifying the CRC would help to encourage legislators and courts to apply the concept more seriously and consistently.<sup>94</sup>

The CRC was adopted by the U.N. General Assembly and opened for ratification in 1989. In 1990, Senator Bill Bradley introduced a resolution (which ultimately attracted sixty co-sponsors) urging the President to submit the CRC to the Senate for ratification; an identical resolution was introduced in the House of Representatives, with eighty-nine co-sponsors.<sup>95</sup> Although both resolutions passed, President George H. W. Bush took no

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<sup>86</sup> CRC, *supra* note 14, at arts. 6, 24, 26.

<sup>87</sup> See generally Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L. L. REV. 199 (2006); Rutkow & Lozman, *supra* note 18.

<sup>88</sup> CRC, *supra* note 14, at arts. 12–15.

<sup>89</sup> See David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L. L. REV. 81, 91–93 (2006).

<sup>90</sup> See, e.g. CRC, *supra* note 14, at arts. 3 (duty to ensure protection and care), 6 (right to life), 19 (duty to protect children from violence and abuse), 34 (duty to protect children from sexual abuse); see also Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS OF THE AMER. ACADEMY OF POL. & SOC. SCI. 80, 86 (2011) (arguing that ratification of the CRC would strengthen the state's duty to protect children from harm).

<sup>91</sup> CRC, *supra* note 14, art. 3.

<sup>92</sup> Bartholet, *supra* note 90, at 85 (arguing that the United States should ratify the CRC but file reservations to Articles 20 and 21 concerning international and interracial adoption).

<sup>93</sup> *Id.* at 86–88 (analyzing numerous examples of court decisions that failed to adequately apply the concept of best interests of the child).

<sup>94</sup> *Id.* at 83–84.

<sup>95</sup> Rutkow & Lozman, *supra* note 18, at 170–71 (also citing more recent resolutions that were adopted in support of ratifying the CRC and other human rights treaties).

action on the treaty. In 1995, President Clinton decided to sign the treaty and was “poised to send the CRC to the Senate for advice and consent to ratification.”<sup>96</sup> It was at this crucial time that Senator Jessie Helms submitted a resolution asserting that the CRC was incompatible with the “God-given right and responsibility of parents to raise their children.”<sup>97</sup> It is largely because of this backlash that the United States still has not ratified the CRC.

While it is primarily the CRC’s participatory rights that conservatives oppose, they also argue that the treaty would weaken U.S. sovereignty and undermine states’ rights. Ratification would obligate the United States to file periodic reports to the U.N. Committee on the Rights of the Child but this is hardly a threat to sovereignty. Indeed, the State Department already reports to the Committee on the Rights of the Child under the two Optional Protocols to the CRC and it submits similar reports to other treaty-monitoring bodies.<sup>98</sup> These committees can only make recommendations for law and policy changes; they cannot compel the United States to do anything. Moreover, if the United States ratifies the CRC, it will almost certainly file a declaration stating that the treaty is not self-executing, which means that the treaty does not have automatic legal force in the United States and will be implemented through domestic legislation and policies.<sup>99</sup> The United States will also file what is known as a “federalism understanding,” which means that in areas of law that are reserved to the states the federal government can only seek to persuade state governments to follow federal standards.<sup>100</sup> Congress does this on a regular basis and many federal laws that affect children (including SORNA) enjoy strong support among conservatives.<sup>101</sup>

The State Department recently confirmed that the United States government supports the CRC and is working towards becoming a full state

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<sup>96</sup> *Id.* at 171.

<sup>97</sup> *Id.* at 172 (quoting S. Res. 133, 104th Cong. (1995)).

<sup>98</sup> For example, the United States regularly reports to the Human Rights Committee, the Committee against Torture, and the Committee against Racial Discrimination because it is a state party to the treaties that these committees monitor.

<sup>99</sup> This is standard practice. *See, e.g.*, the declarations filed when the United States ratified the International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States ratified the treaty Sept. 8, 1992, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en#EndDec).

<sup>100</sup> *See, e.g.*, paragraph 5 of the understandings filed when the United States ratified the ICCPR, *supra* note 99, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV4&chapter=4&lang=en#EndDec) (last visited Dec. 3, 2011).

<sup>101</sup> The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–87 (2006), is another example of a federal law that uses the power of the purse to persuade states to improve the lives of children. The United States Department of Education maintains a web site devoted to the IDEA legislation, its implementing regulations, and policy guidelines, available at <http://idea.ed.gov/> (last visited Dec. 3, 2011).

party to the treaty.<sup>102</sup> Preparation for ratification normally includes an assessment of the extent to which existing laws comply with treaty obligations. It is thus appropriate to assess whether SORNA is consistent with the CRC. Indeed, given the nearly universal ratification of the treaty, it is entirely possible that the core principals of the CRC will eventually be recognized as part of customary international law, and thus binding on the United States regardless of ratification.<sup>103</sup>

Of course the goal of SORNA, which is to prevent sex offenders from repeating their crimes, is entirely consistent with the CRC. Recognizing that children are often the victims of crime, the CRC obligates state parties to take “all appropriate legislative, administrative, social and educational measures” to protect children from violence and abuse, including sexual abuse.<sup>104</sup> Governments should take all appropriate measures, including the enactment of legislation, to prevent the inducement or coercion of a child to engage in unlawful sexual activity. Governments should also promote the physical and psychological recovery and reintegration of child victims of abuse, pursuant to Article 39.<sup>105</sup> The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (to which the United States is a state party) sets forth additional obligations to combat sexual exploitation of children and sex tourism.<sup>106</sup>

In its second periodic report to the Committee on the Rights of the Child, the United States government listed the Adam Walsh Act as one of the principal laws implementing the Optional Protocol to the CRC.<sup>107</sup> The U.S. government has also stated that SORNA standardizes registration of sex offenders and “generally strengthens the nationwide network of sex offender registration and notification programs.”<sup>108</sup> However, given the small number of states that have complied with SORNA thus far, it is

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<sup>102</sup> U.S. DEP’T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW: RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT para. 24, Mar. 10, 2011, *available at* <http://www.state.gov/g/drl/upr/157986.htm>. For updates on the campaign for ratification, see The Campaign for U.S. Ratification of the Convention on the Rights of the Child, <http://childrightscampaign.org/what-is-the-crc/the-status-of-the-crc> (last visited June 29, 2011).

<sup>103</sup> Customary international law is evidenced by consistent state practice and *opinio juris* (accepted as law). Given that the United States continues to state its support for the CRC and has not withdrawn its signature, it would be difficult to argue that the United States has persistently objected to the development of the CRC as customary international law.

<sup>104</sup> CRC, *supra* note 14, art. 19.

<sup>105</sup> *Id.* art. 39.

<sup>106</sup> The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *supra* note 22, at arts. 1–6.

<sup>107</sup> See PERIODIC REPORT OF THE U.S., *supra* note 23, para. 40.

<sup>108</sup> See Dep’t. of Justice, Off. of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Introduction to SORNA*, <http://www.ojp.gov/smart/sorna.htm> (last visited Dec. 22, 2011).

questionable whether SORNA will be widely implemented by the time the Committee reviews the second periodic report. Moreover, given the limited evidence of the effectiveness of sex offender registration in reducing crime, it is not at all clear that SORNA is the most effective way to protect children from sexual abuse.

Additionally, the CRC contains numerous rights that may be violated by laws requiring registration and community notification of juvenile sex offenders, particularly if the legislation is applied in an overly broad manner without sufficient consideration for individual circumstances. Some of these violations of children's rights can arise even when harsh laws are confined to adult offenders. For example, non-offending family members (including children of offenders and child-victims of intra-family sexual abuse) may be forced to share the economic losses and social ostracism that result from sex offender registration laws.<sup>109</sup> It is increasingly common for the family home of a registered sex offender to be targeted by vigilantes.<sup>110</sup> A child who has been abused by a relative may also find that his or her identity as a victim is inadvertently revealed by the offender's inclusion on a public sex offender registry. This provision violates the victim's right to privacy (protected by Article 16 of the CRC) and may also undermine her recovery.

Perhaps most worrying is that sex offender registration laws and other severe punishments (such as mandatory minimum sentences) for sex offenders may deter victims or their parents from reporting sexual abuse by family members.<sup>111</sup> Victims may also be more likely to recant once they realize the consequences of a conviction for a relative. Family members may pressure the victim to recant, which could harm the victim's recovery

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<sup>109</sup> Although a child suffers to some extent whenever a family member commits a crime, publishing the photograph, personal details, and home addresses of sex offenders on the internet necessarily places an unusually heavy burden on children who are related to sex offenders.

<sup>110</sup> Joseph Gallardo was burned out of his house after he was released from prison and he and his brother moved states at least twice to escape protesters and vigilantes. See *Protests Force Sex Offender to Move from Second Town*, N.Y. TIMES, July 20, 1993, available at <http://www.nytimes.com/1993/07/20/us/protests-force-sex-offender-to-move-from-second-town.html>; David Van Biema et al., *Burn Thy Neighbor*, TIME, July 26, 1993, available at <http://www.time.com/time/printout/0,8816,978924,00.html#>. In Scotland, a convicted sex offender, his wife, and son were all forced to flee their home after local residents threatened him and attacked his car with baseball bats. See *Convicted Sex Offender Forced to Flee Home after Vigilante Attack*, SUNDAY HERALD, Sept. 3, 1998, available at <http://www.heraldscotland.com/sport/spl/aberdeen/convicted-sex-offender-forced-to-flee-home-after-vigilante-attack-1.381399>.

<sup>111</sup> See, e.g., CENTER FOR SEX OFFENDER MGMT., LEGISLATIVE TRENDS IN SEX OFFENDER MANAGEMENT 10 (November 2008) (citing William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 83 (2001)).

regardless of whether she decides to recant.<sup>112</sup> Any family would rationally fear the economic and social repercussions of having a relative listed on the sex offender register. In such cases, the registration and community notification requirements may actually undermine the primary purpose of legislation, which is to prevent sexual abuse of children.<sup>113</sup> Similarly, the prospect of being placed on a public sex offender registry naturally decreases the incentive for an alleged sex offender to admit to the abuse and enter a guilty plea.<sup>114</sup> This makes prosecution difficult, especially in cases of sexual abuse within families, in which there is often limited independent evidence.<sup>115</sup>

When considering whether to apply sex offender registration laws to juvenile offenders, states should also consider Article 40 of the CRC, which requires age-appropriate proceedings for children accused of criminal acts. Children should be treated in a manner that promotes their sense of dignity, worth, and reintegration into society.<sup>116</sup> This requires governments to adopt laws, procedures, and dispositions that specifically apply to juvenile defendants and offenders. The CRC suggests a variety of alternatives to institutional care, including guidance and supervision orders, counseling, probation, foster care, education, and vocational training. The overall goal is to ensure that children are dealt with in a manner that is appropriate to their well-being and proportionate to their circumstances and the offense. Under this framework, a child should only be placed on a sex offender registry in extreme cases (for example, when an individual risk assessment demonstrates that the child offender poses a danger to the community). In contrast, SORNA does not employ any risk assessment and applies a rigid three-tier system.

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<sup>112</sup> See Roland M. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177–193 (1983) (documenting the pressures that are put on victims of intra-family sexual abuse to either not report or to recant and the impact that this pressure has on victims); Margaret H. Shiu, *Unwarranted Skepticism: The Federal Courts' Treatment of Child Sexual Abuse Accommodation Syndrome*, 18 S. CAL. INTERDIS. L.J. 651, 654–55 (describing specific cases of alleged intra-family sexual abuse in which the victims experienced significant family pressure to recant).

<sup>113</sup> See Kate Fitch & Diana Sutton, *Sex Offender Management: Children's Rights, Megan's Law and the Child Sex Offenders Review*, 238 CHILDRIGHT 18–19 (2007) available at [http://www.nspcc.org.uk/inform/policyandpublicaffairs/sexoffendermanagement\\_wdf50066.pdf](http://www.nspcc.org.uk/inform/policyandpublicaffairs/sexoffendermanagement_wdf50066.pdf) (explaining why the NSPCC did not support the enactment of legislation similar to Megan's law in the United Kingdom).

<sup>114</sup> In many criminal cases, pleading guilty, expressing remorse, and demonstrating a genuine desire for rehabilitation will lead to a lighter sentence. However, defendants who are charged with sexual offenses know that the judge's hands are tied when it comes to the obligation to register after conviction. In a state that complies with SORNA the judge cannot relieve the defendant of the legal obligation to register as a sex offender.

<sup>115</sup> See Summit, *supra* note 112 (describing the general pattern of secrecy in cases of intra-family sexual abuse).

<sup>116</sup> CRC, *supra* note 14, art. 40(1).

When the United States recently reported to the Committee on the Rights of the Child, it proudly stated that “the most serious offenders, including juvenile offenders, are required to register for life” under SORNA.<sup>117</sup> However, the government’s report did not fully inform the Committee of the controversies surrounding the required registration of juvenile offenders. Hopefully the Committee will seek more information on this issue when it formally reviews the United States’ report.<sup>118</sup> In our view, the United States should not be congratulated for placing certain juvenile offenders in Tier III (and thus categorizing them as the “worst” sex offenders) or for subjecting them to mandatory registration.

Articles 16 and 40 of the CRC further provide that the privacy of a child offender shall be “fully respected” in all stages of the proceedings.<sup>119</sup> In 2007, the U.N. Committee on the Rights of the Child issued a General Comment on Article 40.<sup>120</sup> General Comments are considered to be highly authoritative interpretations of the treaty because the Committee consists of independent experts who have extensive experience reviewing state reports. The Committee reminded governments that “no information shall be published that may lead to the identification of a child offender because” it leads to stigmatization and will impair the child’s right to obtain education, work, and housing.<sup>121</sup> Although the Committee recognized that governments have a legitimate interest in protecting the public, it observed that children “differ from adults in their physical and psychological development” and thus “the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”<sup>122</sup> Routinely placing child offenders on public registries clearly violates children’s rights to privacy. While SORNA no longer requires states to do this,<sup>123</sup> it still *requires* states to place juveniles on registries and permits states to publish that information. Congress could easily reverse this trend by making federal funding contingent on states’ willingness to protect juvenile offenders’ privacy. State and federal laws should provide that child offenders may not be subject to community notification laws except where a judge determines, after an assessment and a hearing, that the child

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<sup>117</sup> See PERIODIC REPORT OF THE U.S., *supra* note 23, para. 40.

<sup>118</sup> For a full list of the country reports to be scheduled for review at a future session of the Committee, see Committee on the Rights of the Child, *Future Sessions*, <http://www2.ohchr.org/english/bodies/crc/future.htm> (last visited June 20, 2011).

<sup>119</sup> CRC, *supra* note 14, art. 40(2)(vii).

<sup>120</sup> Committee on the Rights of the Child, *General Comment No. 10 (2007): Children’s Rights in Juvenile Justice*, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

<sup>121</sup> *Id.* para. 64.

<sup>122</sup> *Id.* para. 10.

<sup>123</sup> See *supra* text accompanying note 78.

actually does pose a danger to the community and that public disclosure is warranted.

Human rights and social welfare organizations have documented the effects of these violations of children's rights. Human Rights Watch conducted one of the most comprehensive studies.<sup>124</sup> In addition to reviewing the relevant literature, the authors of the study interviewed victims of sexual abuse, child safety experts, law enforcement, and sex offender researchers. They also interviewed 122 sex offenders and 90 relatives of sex offenders and documented the profound impact that the label "sex offender" has on a developing child.<sup>125</sup> The interviewees included several individuals who were required to register because they engaged in consensual sex with willing partners under the age of consent. One interviewee was convicted of statutory rape at age sixteen for having consensual sex with his fourteen-year-old girlfriend, who is now his wife. Years later he commented: "We were in love. And now we are married. So it's like I am on the registry for having premarital sex. Does having premarital sex make me a danger to society?"<sup>126</sup>

Unfortunately, sex offender registration laws often do not distinguish between dangerous and non-dangerous offenders. Once a person is on the register, he will inevitably suffer regular humiliation and rejection. A young man named Dan M. described how registration affects him:

I was convicted of statutory rape when I was 17. The girl was 15. Now I am in college [and] I must register every 90 days. . . . I get a call from the [college baseball] head coach to come to the office. My heart is in my throat. He takes me to the athletic director's office. The athletic director is beside himself. He tells me that an officer from the police station comes in to see him and that he says that we have a sex offender on campus that is on his baseball roster. He is angry. He says I must have lied on my application, because I checked no on my college application when it asked if I was ever convicted of a felony. I said I did not lie. [He was adjudicated and has no public criminal record]. . . .

When my family and I go on vacation to visit relatives in other states I must always look up the law as to my duties regarding the list in a particular state. More than two weeks in New York I must register. More than three consecutive days in one county in Florida I must register. My parents moved to Arkansas. If you are in Arkansas you must register after 14 days. They take a statement and fingerprint you. It is always like starting it up all over again. I will be visiting my parents for more than 30 days in a year so I had to be assessed as to my level of risk to reoffend. I had to take a psychological test. I wanted to puke [the questions] were so disgusting. Is that the type of person people think I am? I am not attracted

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<sup>124</sup> HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE UNITED STATES Vol. 19, No. 4(G) (Sept. 2007), *available at* <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

<sup>125</sup> *Id.* at 5–6.

<sup>126</sup> *Id.* at 73.

to children, or dead people. I would never rape anyone. I respect women; I have three sisters, a mother, grandmothers, aunt and girlfriend who I love. I am a good person who made a bad decision with a peer 16 months my junior seven weeks after my 17th birthday. My coach might send me to New York next summer to play baseball. I will have to be assessed by them too. I will have to do this for another 23 years. That is how long I have to register.<sup>127</sup>

However, in some ways, Dan M. is lucky because he will be eligible for removal from the sex offender register after twenty-five years, when he is forty-two (assuming that he is not caught by any retroactive changes to the law). Other teenagers are not so lucky. For example, Human Rights Watch interviewed a woman in Georgia who was required to register as a sex offender for life because she had consensual oral sex with a fifteen year-old boy when she was seventeen. Nine years later, as a married woman, she was compelled to move from her home because it was located in an area in which sex offenders are not permitted to live.<sup>128</sup>

The United States is not the only country grappling with the human rights implications of sex offender registration. The Supreme Court of the United Kingdom recently held that placing an individual on a sex offender registry for the duration of his life, with no opportunity for a review, violates the right to private and family life, as protected by Article 8 of the European Convention on Human Rights.<sup>129</sup> One of the two plaintiffs in the case was eleven years old when he was convicted of raping a younger child. Although the judgment was not confined to individuals who were convicted as children (the second plaintiff was convicted at the age of forty-five), the Supreme Court agreed with the lower court that a person's right to have his status reviewed is "even stronger in the case of child offenders because of the fact that children change as they mature."<sup>130</sup> While the judgment did not automatically remove anyone from the register, it should give the two plaintiffs, and some 24,000 people who are currently on the sex offender register in England and Wales, the opportunity to demonstrate that they have rehabilitated and can be safely removed from the register. The Prime Minister has reluctantly agreed to introduce a mechanism allowing convicted sex offenders to apply for a review fifteen years after being released from custody.<sup>131</sup> The British government apparently intends to give the police (rather than a court or an expert in sex offender management) the final say on whether a person can be safely removed from a registry. However, this arrangement may not survive

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<sup>127</sup> *Id.* at 74–75.

<sup>128</sup> *Id.* at 73.

<sup>129</sup> *R and Thompson v. Sec. of State for the Home Dept.*, [2010] UKSC 17, *available at* [http://www.supremecourt.gov.uk/decidedcases/docs/UKSC\\_2009\\_0144\\_Judgment.pdf](http://www.supremecourt.gov.uk/decidedcases/docs/UKSC_2009_0144_Judgment.pdf).

<sup>130</sup> *Id.* para. 40.

<sup>131</sup> See Alan Travis, *David Cameron Condemns Supreme Court Ruling on Sex Offenders*, GUARDIAN, Feb. 16, 2011, *available at* <http://www.guardian.co.uk/society/2011/feb/16/david-cameron-condemns-court-sex-offenders> (last visited Feb. 25, 2011).



judicial review, as it is hard to imagine that the police can be fully objective in these situations. Shortly after the new policy was announced, a retired British police officer who had worked in child protection units insisted that convicted sex offenders are “like leopards—they don’t change their spots.”<sup>132</sup>

Courts in the United States have been remarkably uncritical in their analysis of sex offender laws when they are applied to adults. However, judges have been slightly more receptive to challenges by child offenders. For example, courts have recognized that children may have a protected liberty interest in the confidentiality of their juvenile delinquency adjudications.<sup>133</sup> A federal court in the District of Columbia thus recognized that any community notification procedures must at least take into account the “heightened interest in avoiding public notification” when a juvenile offender’s conviction had been set aside.<sup>134</sup> In certain cases, limited disclosure of information concerning a juvenile sex offender to law enforcement may be necessary to protect public safety. However, community-wide notification should not be permitted unless there is compelling evidence that the community as a whole is in danger.

In our view, a law that automatically subjects a juvenile offender to lifetime registration, without a consideration of individual risk factors, should be held unconstitutional for failure to comply with substantive due process. The Illinois Supreme Court appeared to come close to such a holding in the case of J.W., a boy who was subjected to lifetime registration at the age of twelve.<sup>135</sup> J.W. admitted to two counts of aggravated criminal sexual assault on a younger child. It did not appear, from the judgment, that J.W. used physical force. However, the therapist who assessed him concluded that he had deliberately sought out younger children to abuse and selected them based upon their trust in him.<sup>136</sup> A key question on appeal was whether the lifetime registration order met the requirements of substantive due process. Although a majority of the Supreme Court of Illinois upheld the order, the Court based its decision in part on the therapist’s assessment of J.W. as being dangerous “to a certain degree” to the community. The Court also stressed the fact that Illinois places limits on community notification for juvenile offenders. Thus, pursuant to the Illinois Notification Law, the information concerning J.W. would not be available on the Internet, and public access would be strictly limited “to those whose safety might be compromised.”<sup>137</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *In re Appeal in Maricopa County Juvenile Action No. JV-132744*, 933 P.2d 1248, 1250–51 (Ariz. Ct. App. 1996).

<sup>134</sup> *Doe No. 1 v. Williams*, 167 F. Supp. 2d 45, 57, 64 (D.C. 2001).

<sup>135</sup> *Illinois v. J.W.*, 787 N.E.2d 747 (Ill. 2003), *cert. denied* 540 U.S. 873 (2003).

<sup>136</sup> *Id.* at 752.

<sup>137</sup> *Id.* at 761.

It appears that the Illinois Supreme Court might well have vacated the lifetime registration order had J.W. not been assessed as dangerous or had he been subjected to full community notification. Two judges in the majority signed a separate opinion calling upon the Illinois legislature to “reconsider the wisdom of imposing such a burden on juveniles” and noting that the “public safety concerns which animate the registration and notification laws should be harmonized with our traditional understanding of the need to protect and rehabilitate the young citizens of this state.”<sup>138</sup> The dissenting judge went much further and concluded that requiring a child offender to register for life was unconstitutional, as it could not be considered a reasonable means of furthering the state’s interest. The dissent could not conceive of any “legitimate rationale for subjecting a juvenile delinquent under the age of thirteen to lifetime registration requirements.”<sup>139</sup> The case, while upholding the registration order in this particular case, indicates that long-term registration and community notification for child offenders skate on the edge of constitutionality. The Illinois Supreme Court also vacated the trial court’s order banishing J.W. from his hometown, although it held that reasonable restrictions could be imposed upon J.W. to minimize contact with his victims.

The enactment of SORNA has invited additional constitutional challenges, in part because of the retroactive application to individuals who were adjudicated as juvenile delinquents even before SORNA’s enactment.<sup>140</sup> The Attorney General, exercising authority delegated by Congress, determined that SORNA would apply retroactively to all sex offenders convicted of qualifying offenses before SORNA came into force, including those who were originally adjudicated as juvenile delinquents. In 2009, the Court of Appeals for the Ninth Circuit vacated a sex offender registration requirement on the ground that retroactive application of SORNA’s juvenile registration requirement is punitive and therefore violates the Ex Post Facto Clause of the United States Constitution.<sup>141</sup> Although the U.S. Supreme Court later vacated the judgment (on the ground that the case was moot when it came to the Ninth Circuit<sup>142</sup>), the

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<sup>138</sup> *Id.* at 767.

<sup>139</sup> *Id.* at 770.

<sup>140</sup> *See* 28 C.F.R. § 72.3 (2007).

<sup>141</sup> *United States v. Juvenile Male*, 581 F.3d 977, 979 (9th Cir. 2009).

<sup>142</sup> *United States v. Juvenile Male*, 180 L. Ed. 2d 811, 813, 815 (2011) (per curiam). The Supreme Court had previously certified the following question to the Supreme Court of Montana: is the “respondent’s duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order . . . or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?” *United States v. Juvenile Male*, 130 S.Ct. 2518 (2010) (citations omitted). The Montana Supreme Court determined that the respondent had an independent duty to register under Montana law. *United States v. Juvenile Male*, 255 P.3d 110, 111 (Mont. 2011).

facts of the case are briefly discussed here because they demonstrate the wide scope of SORNA and its impact on the juvenile justice system.

The appellant (referred to only as S.E. in the judgment) was thirteen when he began to engage in sexual acts with a ten-year-old child. As the victim was under twelve, any sexual act would have been deemed non-consensual, regardless of force and regardless of the age difference between the perpetrator and the victim.<sup>143</sup> The sexual activity continued for several years, until S.E. was fifteen and the younger child was twelve. Had S.E. been an adult, he could have been convicted of aggravated sexual abuse because the victim was initially under the age of twelve.<sup>144</sup> Instead, S.E. was adjudicated delinquent and sentenced to two years detention in a juvenile facility, followed by supervised release until his twenty-first birthday.

At that time, SORNA had not yet been enacted, and S.E. was not initially ordered to register as a sex offender. S.E. completed his confinement and moved to a prerelease center but was removed because he failed to search for a job. The district court then ordered an additional six months of confinement and supervision until S.E.'s twenty-first birthday and imposed a "special condition" requiring S.E. to register as a sex offender.<sup>145</sup> S.E. objected to the registration requirement, arguing that the Ex Post Facto Clause of the United States Constitution bars retroactive application of SORNA to persons designated as juvenile offenders before its enactment. The Ninth Circuit agreed, holding that in view "of the pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings . . . the retroactive application of SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional."<sup>146</sup>

The Ninth Circuit distinguished *Juvenile Male* from the 2003 case of *Smith v. Doe*, in which the U.S. Supreme Court upheld Alaska's retroactive application of sex offender registration requirements to adults.<sup>147</sup> The Supreme Court held that Alaska's statute was not "punitive" because any

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<sup>143</sup> 18 U.S.C. § 2241(c) (2006) defines aggravated sexual abuse as "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years," without specifying any requisite degree of force, or any age differential between the perpetrator and the victim. In contrast, "an offense involving consensual sexual activity is not a sex offense" for the purposes of SORNA "if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." 42 U.S.C. § 16911(5)(C) (2006).

<sup>144</sup> 18 U.S.C. § 2241(c).

<sup>145</sup> *Juvenile Male*, 581 F.3d at 980.

<sup>146</sup> *Id.* at 979.

<sup>147</sup> *Smith v. Doe*, 538 U.S. 84, 106 (2003).

negative consequences (such as social ostracism) could have just as easily resulted from their original convictions, which were a matter of public record. In contrast, SORNA's juvenile registration provision imposes conditions that would not normally follow a juvenile delinquency adjudication, because that information is generally kept confidential.<sup>148</sup> Moreover, as the Ninth Circuit observed, individuals who pled "true" to acts of juvenile delinquency before SORNA's enactment did so with the expectation that their adjudication would remain confidential.<sup>149</sup> If SORNA's juvenile registration requirement is retroactively applied to them, they will now be required to expose that information to the general public and to register in person four times each year, for at least twenty-five years.<sup>150</sup> Had juvenile offenders known that they would later be subjected to these requirements, some might have decided to contest the charges against them.

Because the U.S. Supreme Court never reached the substantive issue in *Juvenile Male*, it is difficult to predict whether it would agree with the Ninth Circuit's assessment of SORNA's retroactive application to juvenile offenders. However, the Supreme Court's landmark decision in *Roper v. Simmons*<sup>151</sup> indicates that it may be sympathetic to a case that challenges the underlying assumption of SORNA's juvenile provisions, that children as young as fourteen can be placed in Tier III and categorized as among the "worst" sexual offenders. In *Roper*, the Supreme Court held that imposing the death penalty on offenders who were under eighteen when they committed their offenses violates the Eighth and Fourteenth Amendments to the U.S. Constitution.<sup>152</sup> The holding in *Roper* stemmed directly from the Supreme Court's finding that "juvenile offenders cannot with reliability be classified among the worst offenders."<sup>153</sup> In reaching this conclusion, the Supreme Court relied on evidence of brain development, which demonstrates three main differences between adolescents and adults: (1) the adolescent brain is still developing, and thus a juvenile offender's personality is still forming; (2) youths lack maturity and have "an underdeveloped sense of responsibility," which often leads to ill-considered behavior; and (3) youths are more vulnerable to peer pressure and other potentially negative influences.<sup>154</sup> States recognize these differences in brain maturity when they enact laws prohibiting individuals who are under eighteen from serving on juries, from voting, and from marrying without parental consent.<sup>155</sup> Because of these psychosocial and neurological

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<sup>148</sup> *Juvenile Male*, 581 F.3d at 979.

<sup>149</sup> *Id.* at 987.

<sup>150</sup> 42 U.S.C. §§ 16915(b)(2)(B), 16916 (2006).

<sup>151</sup> 543 U.S. 551, 578 (2005).

<sup>152</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>153</sup> *Id.* at 569.

<sup>154</sup> *Id.* at 569–70.

<sup>155</sup> *Id.*

differences, adolescents simply should not be categorized among the worst offenders and the purported justifications for the death penalty (retribution and deterrence) apply to juveniles “with lesser force than to adults.”<sup>156</sup> Interestingly, the Supreme Court also cited Article 37 of the CRC, which expressly forbids capital punishment for crimes committed while the offender was younger than eighteen.<sup>157</sup>

It is certainly arguable that the reasoning of *Roper* can be applied to invalidate the provisions in SORNA that place certain juvenile offenders in Tier III and subjects them to mandatory registration.<sup>158</sup> However, rather than wait for a judicial determination on this issue, we recommend that Congress repeal the provisions in SORNA that would compel states to register juveniles as sexual offenders. This would protect the rights of young offenders and bring the United States closer to compliance with the CRC.

Moreover, regardless of whether Congress agrees with our rights-based critique, SORNA should be amended on policy grounds. As demonstrated in the next section, the juvenile provisions of SORNA constitute bad public policy and are unlikely to further the stated goal of protecting children from sexual abuse.

#### IV. POLICY IMPLICATIONS OF APPLYING SEX OFFENDER REGISTRATION LAWS TO JUVENILES

The research on adolescent development cited by the Supreme Court in *Roper* was available when Congress enacted SORNA, and more recent research only strengthens the evidence regarding the differences between juvenile and adult offenders.<sup>159</sup> In addition to affecting the culpability of juvenile offenders, this material should make legislators and policy makers question the wisdom of placing children on sex offender registries. Juveniles constitute approximately one-third of the individuals who are known to the police to have committed sexual offenses against other

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<sup>156</sup> *Id.* at 570–71. The Supreme Court has since held that sentencing a juvenile to life imprisonment without the possibility of parole for a non-homicidal offense also violates the Eighth Amendment. *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010) (applying proportionality analysis to invalidate sentence of life without parole for individuals who committed non-homicide offense before age eighteen).

<sup>157</sup> The Supreme Court did not expressly rely upon the CRC, which is not surprising as the United States is not yet a state party. The fact that the Supreme Court nonetheless cited the treaty may reflect a growing recognition that the CRC contains evolving principals of customary international law.

<sup>158</sup> See, e.g., Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”: How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499 (2006); Jessica E. Brown, Note, *Classifying Juveniles “Among the Worst Offenders”: Utilizing Roper v. Simmons to Challenge Registration and Notification Requirements for Adolescent Sex Offenders*, 39 STETSON L. REV. 369 (2010).

<sup>159</sup> Jianghong Liu, *Early Health Risk Factors for Violence: Conceptualization, Evidence, and Implications*, 16 AGGRESSION & VIOLENT BEHAV. 63 (2011).

minors.<sup>160</sup> This is a significant population, and one can appreciate why parents of young children would seek protection from youths who have abused other children. However, the community response to child sex offenders should be age appropriate and take into account the differences between juveniles and adults, as well as the enormous variation among juvenile offenders themselves. Legislators must also be careful not to subject children to a legal framework that may impede their treatment and rehabilitation, which are methods of benefitting society and are among the primary aims of the juvenile justice system.<sup>161</sup>

Traditionally, state juvenile delinquency laws have two general policy goals. First, the laws provide for the protection and safety of the public. Second, the laws serve the best interests of a delinquent child by providing care and treatment, in the hope that the child can be rehabilitated, live as a law-abiding citizen, and become a productive member of the community. This approach is based on studies of youth rehabilitation, which demonstrate that juveniles are more amenable to treatment and more likely to be rehabilitated than adult offenders. Thus, juvenile delinquency laws and sentencing strategies were not intended to be punitive, but rather corrective and protective. This approach to juvenile justice is entirely consistent with the CRC, which requires states to promote rehabilitation and reintegration of juvenile offenders.<sup>162</sup> Unfortunately, in recent years, legislators in the United States began to deviate somewhat from this rehabilitative model by enacting laws designed to “get tough” on juvenile offenders. As a result, some youthful offenders are treated more like “little adults,” which is a sharp contradiction to the construction of childhood as a “developmental period of innocence, dependence and vulnerability.”<sup>163</sup> These trends arguably make it more difficult for the United States to comply with the standards set in the CRC.<sup>164</sup> Ironically, research indicates that the majority of the American public still favors rehabilitation of juvenile offenders.<sup>165</sup>

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<sup>160</sup> David Finkelhor et al., *Juveniles Who Commit Sex Offenses against Minors*, JUVENILE JUSTICE BULLETIN 1 (Dec. 2009).

<sup>161</sup> Daniel S. Nagin et al., *Public Preferences for Rehabilitation versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL’Y 301 (2006).

<sup>162</sup> CRC, *supra* note 14, art. 40.

<sup>163</sup> Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 189 (2007).

<sup>164</sup> Cynthia L. Schirmer, *Punishing Children as Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT’L L. 715 (2008).

<sup>165</sup> Daniel P. Mears et al., *Public Opinion and the Foundation of the Juvenile Court*, 45 CRIMINOLOGY 223 (2007) (discussing the history of the juvenile justice system and reporting that over 80 percent of respondents support the juvenile justice system); Daniel S. Nagin et al., *supra* note 161, at 301 (challenging the assumption that the public now prefers incarceration to rehabilitation of juvenile offenders).

Franklin Zimring has described the trend toward registering juvenile sex offenders as an “American travesty” because the law increasingly fails to take into account the developmental status of offending youth.<sup>166</sup> Clinical studies of juvenile sex offenders demonstrate that they differ significantly from adult sex offenders in terms of motivation, behavior, and future risk. For example, the vast majority of juvenile sex offenders are not motivated by deviant preferences or deviant sexual arousal towards a minor; this means that they are unlikely to feel a compulsion to repeat their offenses.<sup>167</sup> Their behavior is more likely to have been impulsive, motivated by sexual curiosity, poor judgment, or simple immaturity.<sup>168</sup> Adolescence is a time of awakened sexual interest and sometimes also a period of rule-breaking behavior. As a result, many adolescents will experiment with sexual behavior with minors that will not necessarily persist into adulthood.<sup>169</sup>

Empirical research confirms that the juvenile offenders who are currently being subjected to sex offender registration have lower rates of recidivism than juveniles who have committed nonsexual offenses.<sup>170</sup> Juvenile sex offenders respond well to treatment and rehabilitation programs, and the vast majority (85–95%) will never be re-arrested or reported for a subsequent sexual offense.<sup>171</sup> While a small number of sex-offending youth are at an elevated risk of becoming adult sex offenders, researchers have developed risk assessment tools “to identify those who are more likely to” reoffend and therefore might need to be registered as sex offenders.<sup>172</sup> Given the low recidivism rate and the effectiveness of risk assessment and treatment programs, the community has little to gain from indiscriminate application of registration laws to juvenile sex offenders.

Supporters of SORNA may argue that registering juvenile sex offenders provides an additional layer of protection, allowing parents to isolate children from the small percentage of juvenile sex offenders who will recidivate as they grow into adulthood. However, this argument fails to

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<sup>166</sup> FRANKLIN E. ZIMRING ET AL., *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING* xiii (Univ. of Chicago Press 2009).

<sup>167</sup> FRANK C. DiCATALDO, *THE PERVERSION OF YOUTH: CONTROVERSIES IN THE ASSESSMENT AND TREATMENT OF JUVENILE SEX OFFENDERS* 223 (NYU Press 2009).

<sup>168</sup> Finkelhor et al., *supra* note 160, at 3 (reviewing clinical studies by Becker, Chaffin, Hunter et al., and the Center for Sex Offender Management).

<sup>169</sup> For discussion of the low rate of recidivism among juvenile sex offenders and tools used to predict recidivism, see Amanda B. Powers-Sawyer & Michael H. Miner, *Actuarial Prediction of Juvenile Recidivism: The Static Variables of the Juvenile Sex Offender Assessment Protocol-II (J-SOAP-II)*, 4 SEX. OFFENDER TREATMENT (2009).

<sup>170</sup> Michael F. Caldwell & Casey Dickenson, *Sex Offender Registration and Recidivism Risk in Juvenile Sexual Offenders*, 27 Behav. Sci. & L. 941 (2009); Michael F. Caldwell, *What We Do Not Know about Juvenile Sexual Re-Offense Risk*, 7 CHILD MALTREATMENT 291 (2002).

<sup>171</sup> Finkelhor et al., *supra* note 160, at 3.

<sup>172</sup> *Id.*

take into account the enormous economic and social costs associated with implementing SORNA in the states. The heavy financial burden of complying with SORNA necessarily diverts state funds from other law enforcement activities and sex offender treatment programs, which is especially problematic in a time of tight state budgets. There is also a significant risk that mandatory registration of young offenders will discourage victims and parents from reporting sexual abuse by family and friends, which is a far more prevalent problem than sexual abuse by strangers. This is partly because community notification may inadvertently reveal the identity of the victim, interfering with her privacy and recovery. Parents who fear the long-term negative consequences of sex offender registration also will be reluctant to report cases of incest by siblings or sexual abuse by other relatives. The reality of public notification may even cause victims to recant, as notification affects the entire family unit and not just the offender.<sup>173</sup> “A domestic sexual offender may even use the specter of” registration and community notification “as a tool against the victim and other members of the household to secure their silence.”<sup>174</sup>

Compulsory registration of child sex offenders may also impede efforts to rehabilitate juvenile offenders and thus increase the overall crime rate. The most effective treatment for juvenile sex offenders is multi-systemic treatment (MST).<sup>175</sup> Interestingly, this method of treatment is the same type used for other youth offenders and is not based on treating a youth’s sexually deviant behavior.<sup>176</sup> MST does not isolate or stigmatize a youthful offender, but rather focuses on ways to reintegrate him or her back into the community after an offense has been committed.<sup>177</sup> Restricting children from living in certain neighborhoods and denying them access to school and employment by continuously requiring them to register their address whenever they move will inevitably hamper this type of treatment. The International Association for the Treatment of Sexual Offenders (IATSO) recently published treatment guidelines that emphasize the need to take a developmental approach and avoid stigmatizing or isolating the offending youth.<sup>178</sup> The IATSO maintains that sex offender registries and community

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<sup>173</sup> See Summit, *supra* note 112; Shiu, *supra* note 112.

<sup>174</sup> William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 83, 92 (2001).

<sup>175</sup> See Charles M. Borduin et al., *A Randomized Clinical Trial of Multisystemic Therapy with Juvenile Sexual Offenders: Effects on Youth Social Ecology and Criminal Activity*, 77 J. OF CONSULTING & CLIN. PSYCH. 26–37 (2009); Charles M. Borduin & Cindy M. Schaeffer, *Multisystemic Treatment of Juvenile Sexual Offenders: A Progress Report*, in SEX OFFENDER TREATMENT: ACCOMPLISHMENTS, CHALLENGES AND FUTURE DIRECTIONS 25–42 (Michael H. Miner & Eli Coleman eds., 2001).

<sup>176</sup> DiCATALDO, *supra* note 167, at 228.

<sup>177</sup> *Id.*

<sup>178</sup> Michael Miner et al., *Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders*, 1 SEX. OFFENDER



notification should not be applied to juveniles, citing the “potentially harmful effects on the very communities these policies seek to serve.”<sup>179</sup> Of course, there are situations in which a juvenile offender presents a real danger to the community. However, these situations are best dealt with through special processes whereby a child can be waived into adult court, after a comprehensive assessment, and tried as an adult.

Zimring suggests several policy revisions to improve current approaches to juvenile sex offender registration and notification.<sup>180</sup> For example, states could divert first offenders into supervision and treatment programs rather than accepting or finding guilt. This would protect youth from the registration requirement. Re-labeling the offense to one that is not on the offender registry could also be done for first offenders. He also recommends sealing juveniles’ records, so that they could be opened only if a juvenile recidivates or becomes an adult offender. Unfortunately, Congress is pushing states in the opposite direction by making federal funding contingent upon mandatory registration of certain categories of juvenile offenders without any mechanisms to protect these children and preserve their opportunities for rehabilitation.<sup>181</sup>

As noted earlier this article, Hawaii is one of the states that has chosen not to comply with the juvenile registration provisions of SORNA. In 2009, Hawaii had seventeen forcible rapes and seventy other sexual offenses committed by juveniles.<sup>182</sup> The Department of Health funds several programs designed to treat these individuals, including a small residential treatment facility for those who need to be contained. The Family Court refers adjudicated youths to this treatment facility and most remain in treatment for approximately eighteen months, followed by an additional six months of probation.<sup>183</sup> Each juvenile offender is given a psycho-sexual assessment to determine the need for the program and the appropriateness of this treatment modality. All levels of sex offenders may be assessed for placement in the residential program and most are between the ages of fourteen and eighteen.<sup>184</sup> This type of residential treatment program is

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TREATMENT 3–4 (2006) (summarizing Standards of Care adopted by the membership at the General Assembly of the International Association for the Treatment of Sexual Offenders in Hamburg, Germany, Sept. 7, 2006), *available at* <http://www.sexual-offender-treatment.org/49.html>.

<sup>179</sup> *Id.* para. 8.

<sup>180</sup> ZIMRING, *supra* note 166 at 152–59.

<sup>181</sup> As discussed earlier in the article, states that do not comply with SORNA, including the juvenile registration provisions, will lose ten percent of their Byrne/JAG funds in 2012. See U.S. DEP’T. OF JUSTICE, *supra* note 52.

<sup>182</sup> LYDIA SEUMANU FUATAGVI & PAUL PERRONE, DEP’T OF THE ATT’Y GEN., CRIME PREVENTION & JUSTICE ASSISTANCE DIVISION, CRIME IN HAWAII 99 (Sept. 2010).

<sup>183</sup> Information regarding the sex offender treatment programs in the State of Hawaii was provided by Dr. Barry Coyne, Department of Public Safety.

<sup>184</sup> Information provided by Mr. Steve Blotzke, Chief Executive Officer, Benchmark Behavioral Health, Pearl City, Hawaii (a nonprofit organization that provides residential

based on empirically-driven risk assessment matrices and evidence-based interventions. The community is protected from the small number of juvenile offenders who are determined to be dangerous and these youth receive effective treatment. In our view, Hawaii's approach is far superior to the mandatory registration and notification requirements of the Adam Walsh Act. Hawaii's law and policies are also consistent with the CRC, a treaty that the United States government claims to support and hopes to ratify.

### CONCLUSION

The rights-based critique and policy analysis both lead to the same conclusion: the juvenile provisions of SORNA should be amended. Public policy is too often crafted when emotions are high. When a child suffers the horror of sexual abuse, the community understandably wants *something* to be done to protect that child from a reoccurrence and to protect other children from similar attacks. Yet the resulting legislation has frequently done more to undermine children's rights than to protect children from violence. Laws affecting juvenile sex offenders should be consistent with research on adolescent brain development and empirical studies of recidivism. SORNA is based on neither of these; it has simply swept certain categories of juvenile offenders into the adult world of criminal behavior. SORNA clearly violates the CRC, which provides that child offenders have a right to be rehabilitated and reintegrated into the community. SORNA also violates the spirit and philosophy of decades of juvenile justice policies and practice.

The CRC and the family court movement both recognize that most children learn to make more responsible choices as they mature and that juvenile offenders deserve to be given a genuine second chance. Similarly, sex offender treatment experts recognize that adolescents are not fully mature, are changeable, and are thus capable of becoming productive and law-abiding citizens. Unfortunately, there is a fundamental conflict between this view and the popular image of the sex offender, who is presumed to have a deviant and fixed preference to sexually abuse children.<sup>185</sup> This image does not fit many of the individuals who have been ordered to register as sex offenders and it is particularly inappropriate for children.<sup>186</sup> We do not dispute the fact that juvenile sex offenders need to be taken seriously. But legislators and policy makers should base

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services to sex offending youth under a contract with the Department of Health, State of Hawaii).

<sup>185</sup> However, public opinion research indicates that the public does not tend to support registering very young sex offenders and those who have committed relatively minor offenses. See Jessica M. Salerno et al., *Psychological Mechanisms Underlying Support for Juvenile Sex Offender Registry Laws: Prototypes, Moral Outrage, and Perceived Threat*, 28 BEHAV. SCI. & L. 58, 78 (2010).

<sup>186</sup> DiCATALDO, *supra* note 167, at 212.

legislation on solid research and should make an effort to comply with international standards. Rather than requiring states to register juvenile sex offenders without regard to individual circumstances, Congress should make federal funding contingent on state laws that respect children's right to an age-appropriate proceeding and a genuine opportunity to be rehabilitated.